

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JOHN L. CORRIGAN,

Plaintiff,

v.

WSP TROOPER D. DALE and D.
BURT; JUDGE A. HILLE, and
DEPUTY PROSECUTOR B.
SCUDDER,

Defendants.

NO. CV-07-227-RHW

**ORDER GRANTING
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT;
DENYING PLAINTIFF'S
MOTION FOR RECUSAL**

Before the Court are Defendants Dale and Burt's Motion for Summary Judgment (Ct. Rec. 86), and Plaintiff's Motion for Recusal (Ct. Rec. 90). The motions were heard without oral argument.

1. Plaintiff's Motion for Recusal

Plaintiff asks this Court to recuse itself from the above-captioned case pursuant to 28 U.S.C §§ 144 and 455. Plaintiff alleges that bias and prejudice on the part of this Court against Plaintiff. The alleged bias and prejudice arises from the Court's ruling against Plaintiff in previous rulings.

Section 144 requires a party to file a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice against him. 28 U.S.C. § 144. An affidavit filed pursuant to that section is not legally sufficient unless it specifically alleges facts that fairly support the contention that the judge exhibits bias or prejudice directed toward a party that stems from an extrajudicial source. *United States v. Sibla*, 624 F.2d 864, 867 (9th Cir. 1980).

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JUDGMENT; DENYING PLAINTIFF'S MOTION FOR RECUSAL ~ 1**

1 While a judge has a duty to recuse himself or herself if the affidavit supports
2 a claim of legally cognizable bias or prejudice, he or she also has an equally
3 unavoidable duty not to recuse himself or herself when facts verified by an
4 affidavit do not support an allegation of legally cognizable bias or prejudice.
5 *United States v. Diorio*, 451 F.2d 21 (2nd Cir. 1971); *Edwards v. United States*, 334
6 F.2d 360 (5th Cir. 1964).

7 Section 455 is directed to judges and imposes a duty on the judge to
8 disqualify himself where the judge has a personal bias or prejudice concerning a
9 party. 28 U.S.C. § 455(b)(1).

10 Here, Plaintiff has failed to support his contention that this Court is biased or
11 prejudiced against him that stems from an extrajudicial source, and as such, it is
12 legally insufficient as a matter of law under section 144. Moreover, the Court does
13 not have a personal bias or prejudice against Plaintiff.

14 Therefore, Plaintiff's Motion for Recusal is denied.

15 **2. Defendants' Motion for Summary Judgment**

16 In their answer, Defendants asserted a counterclaim for malicious
17 prosecution under Wash. Rev. Code § 4.24.350. Defendants now move for
18 summary judgment on their counterclaim.

19 Plaintiff challenges the counterclaim by arguing that he did not receive
20 proper notice of the claim because Defendants "buried [their] counterclaim on page
21 6 of [their] answer," and the "counterclaim looks like an afterthought by defendant
22 is not properly before the court." (Ct. Rec. 89).

23 The Court finds that the counterclaim was properly raised. Moreover, the
24 Court finds that Defendants have met their burden of showing that they are entitled
25 to relief under the malicious prosecution statute.

26 Wash. Rev. Code § 4.24.350 provides:

27 (1) In any action for damages, whether based on tort or contract or
28 otherwise, a claim or counterclaim for damages may be litigated in the
principal action for malicious prosecution on the ground that the

1 action was instituted with knowledge that the same was false, and
2 unfounded, malicious and without probable cause in the filing of such
3 action, or that the same was filed as a part of a conspiracy to misuse
4 judicial process by filing an action known to be false and unfounded.

5 (2) In any action, claim, or counterclaim brought by a judicial officer,
6 prosecuting authority, or law enforcement officer for malicious
7 prosecution arising out of the performance or purported performance
8 of the public duty of such officer, an arrest or seizure of property need
9 not be an element of the claim, nor do special damages need to be
10 proved. A judicial officer, prosecuting authority, or law enforcement
11 officer prevailing in such an action may be allowed an amount up to
12 one thousand dollars as liquidated damages, together with a
13 reasonable attorneys' fee, and other costs of suit. A government entity
14 which has provided legal services to the prevailing judicial officer,
15 prosecuting authority, or law enforcement officer has reimbursement
16 rights to any award for reasonable attorneys' fees and other costs, but
17 shall have no such rights to any liquidated damages allowed.

18 The purpose of the statute is to promote the interests of judicial economy
19 and to protect defendants from meritless attacks. *Hanson v. Estell*, 100 Wash.
20 App. 281, 286 (2000). Actions for malicious prosecution are not favored in the
21 law, although when the proper elements have been established, it is appropriate to
22 award damages. *Clark v. Baines*, 150 Wash. 2d 905, 911 (2004). A defendant may
23 only assert a malicious prosecution counterclaim under RCW 4.24.350 based on an
24 improperly filed cause of action as a whole. *Brin v. Stutzman*, 89 Wash. App. 809,
25 815 (1998).

26 Because Defendant Burt and Dale are law enforcement officers, in order to
27 prove a malicious prosecution counterclaim, they need to show: (1) that
28 prosecution claimed to have been malicious was instituted or continued by
Plaintiff; (2) that there was want of probable cause for the institution or
continuation of the prosecution; (3) that proceedings were instituted or continued
through malice; (4) that proceedings terminated on the merits in favor of
Defendants, or were abandoned; and (5) that Defendants suffered injury or damage
as a result of the prosecution. *Id.* Although all elements must be proven, malice
and want of probable cause constitute the gist of a malicious prosecution action.

Id.

Here, the Court finds that there are no questions of material fact and that summary judgment is appropriate. Malice can be inferred by the fact that Plaintiff sued these two Defendants regardless of the fact that the identical claims based on the same conduct at issue in this case were dismissed by Judge Van Sickle in 2004. *See* Restatement (Second) of Torts § 679 (1977)¹; *see also Greenburg v. Wolfberg*, 890 P.2d 895, 901 (Okla. 1994) (holding that repetitive suits for the same cause of action may be used as proof of an improper motive or of malice.). Plaintiff failed to present any evidence to rebut this inference. Plaintiff's claims were dismissed in favor of Defendants, and Defendants suffered injury as a result of the prosecution. Defendants are entitled to statutory damages and attorneys' fees. *See Cross v. City of Port Orchard*, 2001 WL 1609759 (9th Cir. 2001) (awarding liquidated damages and attorneys' fees pursuant to Wash. Rev. Code § 4.24.350 where plaintiff failed to raise genuine issue of material fact).

Accordingly, **IT IS HEREBY ORDERED:**

1. Defendant's Motion for Summary Judgment (Ct. Rec. 86) is **GRANTED**.

2. Plaintiff's Motion to Recuse Judge Robert H. Whaley (Ct. Rec. 90) is **DENIED**.

¹§ 679. Repetition of Civil Proceedings.

One who repeatedly initiates civil proceedings against another for the same case of action is subject to liability for the harm caused thereby, if (a) the proceedings are initiated without probable cause, and primarily for a purpose other than that of securing the proper adjudication of the claim on which the proceedings are based, and (b) except when they are ex parte, the proceedings have terminated in favor of the person against whom they are brought.

See also Comment (c), indicating that termination of the first action in favor of the then defendant is normally conclusive evidence that there is no probable cause for bringing the second proceeding and is evidence that it was brought for an improper purpose.

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1 3. The District Court Executive is directed to enter judgment in favor of
2 Defendants and against Plaintiff in the amount of \$2,000 in liquidated damages
3 (\$1000 awarded to Dean Burt and \$1000 awarded to Dan Dale) and \$3,366.55 in
4 reasonable attorneys' fees.

5 **IT IS SO ORDERED.** The District Court Executive is directed to enter this
6 Order, forward copies to Plaintiff and counsel, and close the file.

7 **DATED** this 7th day of April, 2009.

8 *S/ Robert H. Whaley*

9 ROBERT H. WHALEY
10 Chief United States District Judge

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